STATE OF MICHIGAN

TWENTIETH JUDICIAL CIRCUIT COURT
OTTAWA COUNTY

JON A. VAN ALLSBURG
CIRCUIT JUDGE - FAMILY DIVISION

December 6, 2006

Hon. John Stahl, Chairman
Committee on Family and Children Services
Capitol Building
Lansing, Michigan

RE: House Bill No. 5267 – Comments for Consideration at Committee Meeting
Committee on Family and Children Services
Wednesday, December 6, 2006, 10:30 a.m.
Rm. 519, Capitol Building, Lansing, MI

Dear Chairman Stahl and Members:

I regret that I'm unable to appear at the committee's meeting on December 6 to offer these comments personally, but appreciate your consideration of my written statement. I am a Circuit Judge in the 20th Circuit Court in Ottawa County, Michigan. My caseload includes one-half of the county's domestic relations caseload, as well as all appeals to the Circuit Court and 20% of the general civil docket. I've been a member of the Circuit Court since January 2005, and before that was in private practice for more than twenty years in Holland, Michigan, engaged in the general practice of law with a significant percentage of my practice devoted to family law. I'm a member of the Family Law Section of the State Bar of Michigan, a member of the National Council of Juvenile and Family Court Judges, and have recently been appointed to the Family Division Academic Advisory Committee by the Michigan Judicial Institute, the educational arm of the Michigan Supreme Court.

Although the opinions I express here today are my own, I've been authorized by my Chief Judge and my Family Court colleagues in Ottawa County to let you know that they share my opinions about proposed House Bill 5267. In my opinion, this proposal is not in the best interests of Michigan's children. In fact, it moves public policy away from the statutory mandate that in a child custody dispute between the parents, "the best interests of the child control." MCL 722.25(1). HB 5267 moves us toward a policy that relegates children's best interests to secondary status, behind the "equal rights" of their parents.

Under HB 5267, parents would have a right to "joint custody" in which the child resides with each parent for "specific and substantially equal periods of time." This sounds much more like the requirement for a "fair and equitable" property settlement

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than a custody and parenting time schedule designed with the best interests of the child in mind.

Current law gives the court discretion to award joint custody if "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." Current law further provides that if the parties agree on joint custody, the court must award it unless there is clear and convincing evidence that it is not in the best interests of the child.

Section 1 of the proposed law requires joint physical custody (defined as alternating between the parents' residences for substantially equal periods of time) unless 1) there is clear and convincing evidence that a parent is unfit, unwilling, or unable to care for the child, or 2) a parent moves outside of the child's school district and is "unable to maintain the child's school schedule without interruption." HB 5267 would remove the court's consideration of the parents' ability to cooperate and substitute for it an evaluation of the parents' ability to "maintain the child's school schedule." This obviously doesn't affect pre-school children, except to remove any assessment of the parents' level of cooperation.

More importantly, this change would mandate the adoption of any joint custody agreement between the parents, without permitting the court to assess its impact on the child's best interests. This change would dramatically affect the "equal playing field" between parents – which is required by consideration of the best interest factors under current law – and would result in more "agreements" imposed on a weaker or poorer parent. Under HB 5267, such agreements are mandated to become court orders, and thus permit parents to make changes in custody orders for reasons other than the child's best interests. Any consideration of best interests is reduced to an evaluation of the child's school schedule. Whether two parents are able to "maintain the child's school schedule" is not deserving of such overriding statutory importance. The existing "best interest" factors found in Section 3 of the Child Custody Act provide a far better basis for evaluating and protecting the best interests of the child.

Although there are a number of cases in which joint physical custody (in the sense of "substantially equally periods of time" with each parent) works well and in the child's best interest, there are still a substantial number of cases in which it does not. Divorce is a traumatic event for any family, and the issues that gave rise to the split, together with the adversarial nature of the court system, make cooperation difficult. It's clear to me that most parents have their children's best interests in mind. Unfortunately, not all do. Not a week goes by in Family Court without another case occurring in which the best interests of the child have been overridden or ignored in a battle between parents for some other purpose, whether financial advantage, anger, control, vindictiveness, etc.

Equal physical custody inevitably requires the child to move back and forth on a regular and frequent basis. While this can work well between cooperative parents, it often doesn't. The result is not that a child has two homes, but none. I have interviewed many children who don't feel they have their own bedroom, but go back and forth

between "hotel rooms" in both parent's homes. They never get to fully unpack, and their friends never know where to call them, so their relationships with their peers are diminished. School performance can suffer when homework and study schedules have to be juggled between two homes. When the parents hate each other, the children may be walking on eggshells or fending off inquiries by one parent for information about the other. The children too often become conduits for information between parents, increasing their stress. In these cases, joint physical custody may be equal for the parents, but hell for the child.

In my opinion, keeping the focus of joint custody on the best interests of the child is extremely important. HB 5267 moves away from that focus, and therefore should not be adopted.

Ottawa County's experience may be helpful here. Our Friend of the Court has kept a record of its custody recommendations to the court in disputed cases over the past year to-date, representing 165 total cases (see attached Exhibit A). In this court's experience, the Friend of the Court's custody investigations and recommendations serve an alternative dispute resolution function, and many cases are resolved on terms similar to those recommended by the Friend of the Court. In those custody cases which go to trial, the actual custody awards also tend to be similar to the Friend of the Court's recommendations.

In these 165 litigated cases, approximately one-third resulted in a recommendation for joint legal and joint physical custody under current law. More interestingly, in those cases in which joint physical custody was not recommended, the recommendation for physical custody was split nearly evenly between mothers (52 cases) and fathers (53 cases). Joint legal custody was recommended in nearly all of those cases. These numbers do not suggest the existence of a problem requiring a one-size-fits-all solution, particularly when that solution steers Michigan's public policy away from the best interests of the child. This data also suggests that in two-thirds of these contested cases, joint physical custody was not in the best interests of the children involved. [Please note: there are a much larger number of cases, not represented here, in which custody decisions are made by agreement of the parents, without custody investigations or contested hearings.]

Many of the complaints about the current system have less to do with the way the law is currently written, than with the differences between judges. HB 5267 appears to be primarily promoted by fathers who believe that the judges in their cases are biased toward giving mothers physical custody of their children. Michigan's family courts are part of Michigan's constitutional requirement for "one court of justice." This ideal requires that judicial rulings, including custody decisions, be consistently made whether in Grand Haven, Lapeer, Lenawee, or Marquette.

Fairness and equality in Family Court does not mean that all custody decisions must be the same. It does mean that in cases having similar facts and circumstances, the decisions should be similar. However, because there are so many potential issues and

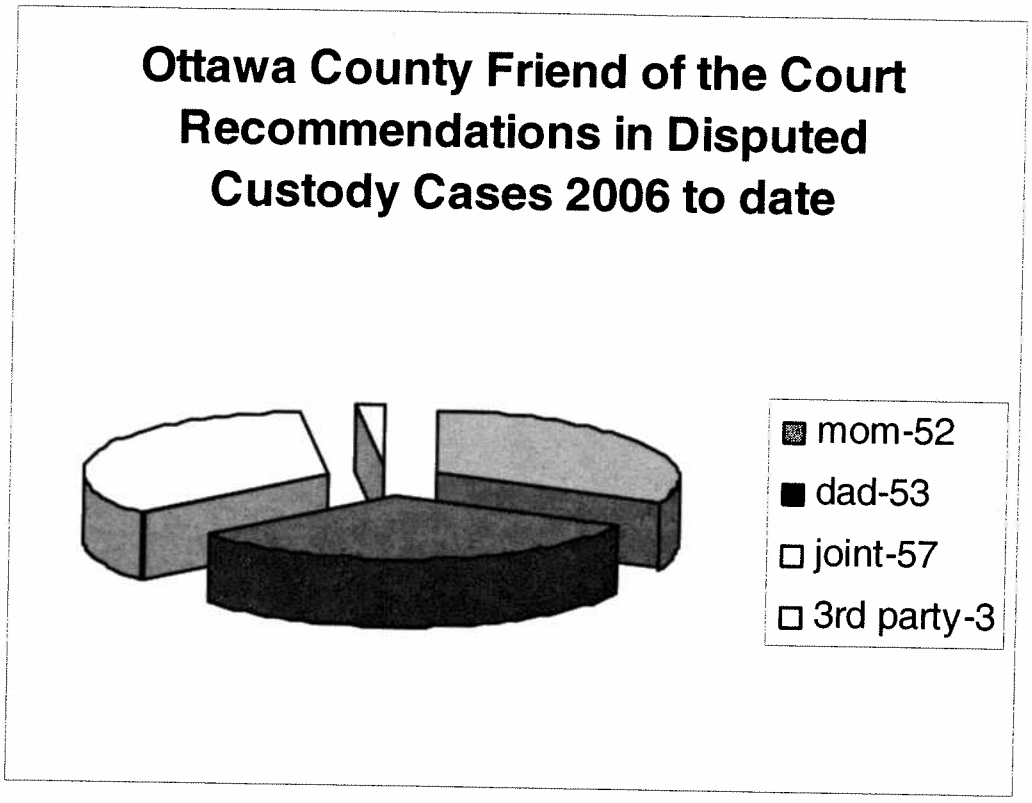
variables in custody disputes, comparing one case to another is invariably misleading, like comparing apples to oranges. In spite of that caveat, there are cases in which a judge's biases are claimed to play an inappropriate role (though Ottawa County's statistics don't support that argument). Changing legislation is a poor way to deal with that problem. While it may affect the decisions of a biased judge, it will affect many cases beyond those intended, and will hurt the ability of good judges to look out for the best interests of children. The "law of unintended consequences" certainly applies here, and calls for a vote **against** adoption of HB 5267.

Thank you for your consideration.

Sincerely yours,

Jon A. Van Allsburg
Hon. Jon A. Van Allsburg

EXHIBIT A


Ottawa County Friend of the Court Recommendations in Disputed Custody Cases 2006 to date
mom-52
dad-53
joint-57
3rd party-3